

BOARD OF PSYCHOLOGY INITIAL STATEMENT OF REASONS

Hearing Date: May 21, 2011

Subject Matter of Proposed Regulations: Delegation of Functions and Unprofessional Conduct

Sections Affected: Title 16, Division 13.1, California Code of Regulation Sections 1380.4, 1397.2, and the title of Article 7

Introduction

During July 2009, a series of articles appeared in the Los Angeles Times newspaper pointing out consumer protection issues and findings of egregious licensee misconduct at a specific healing arts licensing board within the Department of Consumer Affairs (Department). The articles addressed systemic problems with how the board handled complaints, investigations, disciplinary actions, and probation monitoring.

Based on these findings, the Department held a series of meetings to address these findings. The Department also reviewed existing enforcement processes of other Department healing arts boards. The review discovered systematic problems due to legal, procedural, and inadequate resources that limit a board's ability to investigate and act on cases in a timely manner.

The Department worked with the healing arts boards to identify areas that could be improved administratively to better coordinate the Department's enforcement objectives, improve services provided to the boards, and to establish streamlined processes and procedures. The Department recognized the need for all healing arts boards to review their processes and realign consumer protection laws and regulations to ensure that consumer protection is paramount.

In response to this review, the Department launched the Consumer Protection Enforcement Initiative (CPEI) to overhaul the enforcement processes used by healing arts boards within the Department.

Business and Professions Code Section 2920.1 mandates that protection of the public shall be the highest priority of the Board of Psychology in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

This regulatory proposal is in response to the Department's request to implement regulations to enhance the Board's mandate of consumer protection.

Specific Purpose of each adoption, amendment, or repeal:

Amend Section 1380.4. Delegation of Functions

This proposal would delegate authority to the Executive Officer to approve settlement agreements for revocation, surrender, or interim suspension of a license or registration.

Factual Basis/Rationale:

Existing law requires that the Board, itself, vote to adopt all stipulated settlement agreements proposed to be entered into by the Board's Executive Officer. Government Code Section 11415.60(c) provides for delegation of this function.

Under existing law, the Executive Officer has the authority to pursue administrative action against a licensee or registrant who has violated the law. Ultimately it is the Board that votes on all decisions, including proposed decisions rendered by an Administrative law Judge, and stipulated settlements. This proposal would delegate to the Board's Executive Officer the authority to adopt settlement agreements (stipulated decisions) for revocation, surrender, or interim suspension of a license or registration.

Authorizing the Board's Executive Officer to approve Stipulated Settlements resulting in revocation, surrender of a license or registration, or interim suspension will allow the Board to focus on more pressing disciplinary matters and will shorten the timeline for Stipulated Surrender cases to take effect, thus adding to consumer protection by allowing the orders to become effective in a more timely manner.

This proposal would also clarify the authority of the Executive Officer to order an applicant for licensure or registration or a licensee or registrant to submit to a physical or mental examination if it appears that the applicant, licensee, or registrant may be unable to safely perform the duties and functions of a psychologist, psychological assistant, or registered psychologist due to physical or mental illness affecting competency.

Factual Basis/Rationale:

Existing law, Section 820 of the Code, authorizes the Board to examine licensees and registrants for mental illness or physical illness affecting competency. Pursuant to Business and Professions Code Section 2906.5, the Board may refuse to issue any license or registration whenever it appears that an applicant may be unable to practice his or her profession safely due to mental illness or chemical dependency.

This proposal would clarify the authority of the Executive Officer to compel an applicant for licensure or registration that has physical or mental health issues to submit to physical or mental examinations to assist the Board in determining an applicant's fitness for licensure or registration. The proposal would also clarify the authority of the Executive Officer to deny the application if the applicant is unable to

safely practice, based on the review of the evaluation report.

Amend the title of Article 7 of Division 13.1

This proposal would amend the title of Article 7 of Division 13.1 from Restoration of Suspended or Revoked Licenses, to Standards Related to Denial, Discipline, and Reinstatement of Licenses or Registrations.

Factual Basis/Rationale:

California Code of Regulations contained in Article 7 include provisions for probation monitoring, substantial relationship criteria defined, rehabilitation criteria for denials and reinstatements, and rehabilitation criteria for suspensions or revocations. The title is being amended to provide clarification of the subject matter of the regulations contained within Article 7.

Adopt Section 1397.2:

Section 1397.2(a)(1), (2)

This proposal would, in addition to conduct described in Business and Professions Code Section 2960, further define “Unprofessional Conduct” to also prohibit the inclusion of provisions in agreements to settle civil disputes that would forbid another party to the dispute from contacting, cooperating with, or filing a complaint with the Board, or that would require another party to the dispute to attempt to withdraw a complaint the party has filed with the Board, either before or after the filing of an action to which the licensee or registrant is or expects to be named as a party.

Factual Basis/Rationale:

The increasing use of provisions in civil dispute settlements prohibiting the other party from contacting, cooperating with, or filing complaints with the Board, hereafter, an “agreement not to pursue,” denies consumers the right to file complaints and prevents the Board from investigating and disciplining licensees or registrants who present a danger to consumers. These licensees or registrants may continue to practice and harm the public because the Board is not aware of civil dispute settlements. This proposal would prevent licensees or registrants who have violated the law from avoiding disciplinary action against their licenses or registrations.

“Agreements not to pursue” can delay and thwart the Board’s effort to investigate possible cases of misconduct, thereby preventing the Board from protecting the public. These clauses delay action by the Board and tarnish the reputation of competent and reputable licensed and registered health care professionals. By allowing repeat offenders who injure patients to hide their legal acts from the Board further prevents the Board from protecting consumers.

It has been argued that a licensee or registrant should not be subject to review by the Board after a civil settlement has been reached. Protection from license or registration

disciplinary action does not attach to civil proceedings or subsequent administering proceedings. Criminal, civil, and administrative proceedings each serve entirely different legal functions. No ordinary citizen can claim immunity from one proceeding because he or she already underwent the other. It necessarily follows that Board licensees and registrants should not enjoy any exception to the rule of legal process.

Section 1397.2(b)

This proposal would also define as “Unprofessional Conduct” failure to provide the Board with lawfully requested copies of documents within 15 days of receipt of the request or within the time specified in the request, whichever occurs later unless the licensee or registrant is unable to comply for good cause. “Good cause” is specified to include physical inability to access the requested records in the time allowed due to an illness or travel.

Factual Basis/Rationale

Failure of a licensee or registrant to provide lawfully requested documents delays the Board’s investigation of consumer complaints. The obtaining and inspection of documents is crucial in investigating consumer complaints and taking appropriate action against a licensee or registrant who may cause patient harm.

Patient records can only be obtained under two circumstances: 1) the patient has given written authorization for release of the records to the Board; and 2) pursuant to a subpoena. Under both circumstances penalties would apply if the records are not supplied by those who have both possession and control over the records.

Existing law, California Business and Professions Code (Code) Section 2969(a)(1), specifies that a licensee who fails or refuses to comply with the Board’s request for records, within 15 days of receiving the request, is required to pay a civil penalty to the Board of \$1000 per day for each day the records are not produced, up to a maximum of \$5,000. Existing law, Section 2960 of the Code, specifies that any licensee or registrant may have their license or registration revoked, suspended, reprimanded, or placed on probation by the Board for unprofessional conduct, incompetence, gross negligence, or repeated acts of negligence in their profession. Section 2969(d) of the Code, specifies that failure to comply with a court order issued in the enforcement of a subpoena mandating the release of records to the Board constitutes unprofessional conduct and is grounds for suspension or revocation, however there is no similar language for failure to comply with a request for records that is accompanied by the patients written authorization for the release of records to the Board.

A licensee or registrant who does not provide requested information, or who does not cooperate with the Board, can create a significant delay in an investigation and can endanger patient safety. The proposed regulation identifies the failure of a licensee or registrant to provide requested records as an act of unprofessional conduct, and ultimately authorizes the Board to take disciplinary action against a licensee or registrant who fails to provide records upon request accompanied by written

authorization. This will enable the Board to more quickly investigate the underlying allegations and offenses and act accordingly to provide better consumer protection. If a licensee or registrant is able to demonstrate “good cause” for being unable to comply with a records request, they may contact the Board and may be granted an extension of time to return the records depending on the circumstances.

1397.2(c)

Also defined as “Unprofessional Conduct” is the failure to cooperate and participate in any Board investigation pending against a licensee or registrant.

Factual Basis/Rationale:

Again, failure of the licensee or registrant to cooperate with the Board in an investigation further erodes the Board’s mandate of consumer protection. This proposal would not, however, deprive a licensee or registrant of any privilege guaranteed by the Fifth Amendment to the Constitution or other constitutional or statutory privileges. Additionally, this proposal would not require the licensee or registrant to cooperate with a request that would require them to waive any constitutional or statutory privilege.

1397.2(d)

This proposal would further define as “Unprofessional Conduct” the failure of a licensee or registrant to report to the Board within 30 days the bringing of an indictment or information charging a felony, an arrest, conviction of a crime; any disciplinary action taken against another licensing entity; or failure or refusal to comply with a court order issued in the enforcement of a subpoena mandating the release of records to the Board.

As part of the licensing process, all applicants for licensure as a psychologist or registration as a psychologist or psychological assistant are fingerprinted for purposes of conducting criminal history background checks through the California Department of Justice (DOJ) and Federal Bureau of Investigation (FBI). In most cases, the Board receives subsequent arrest notifications for licensees or registrants convicted of crimes. The Board, however, may not always be made aware of convictions or other actions. Additionally, other agencies may not be required to report actions or not be aware that the individual has a psychologist license, psychological assistant registration, or is a registered psychologist in California.

Factual Basis/Rationale:

By requiring licensees and registrants to report this information, the Board gains an additional enforcement tool so that a determination may be made to pursue disciplinary action against the licensee or registrant, as appropriate.

Underlying Data

1. Department of Consumer Affairs, Consumer Protection Enforcement Initiative,

Updated 1/21/10. <http://www.dca.ca.gov/about_dca/cpei/index.shtml>, under read about the initiative here.

2. Department of Consumer Affairs, SB 1111 (4/12/2010 version) Proposed Changes through Regulations

Business Impact

This regulation will not have a significant adverse economic impact on businesses because it only impacts psychologist licensees, registered psychologists, and psychological assistant registrations.

Specific Technologies or Equipment

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No reasonable alternative to the regulation would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

1. Not adopt the regulations. This alternative was rejected because the Board has identified areas of concern regarding enhanced protection of consumers.
2. Adopt regulations. The Board determined that this alternative is the most feasible because it will assist the Board in its mandate of consumer protection.